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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-3

MARGARET HOUSEN,

Petitioner,

against

"PONY" DUKE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary

This case involves only the construction and application of the law of the State of Wyoming including the law of other States "borrowed" as required by Wyoming law. The highest Court of the State of Wyoming has, according to petitioner, erroneously applied the Wyoming statute of limitation (including its borrowing statute), erroneously applied its usual appellate procedures, and erroneously shifted the burden of proof normally applied by Wyoming Courts.

We submit that the Wyoming Supreme Court is the final arbiter of the construction and application of Wyoming law. We submit further that even if the Wyoming Supreme Court erred, as claimed by petitioner, nonetheless such er-

ror does not rise to the level of a constitutional error reviewable in this Court. Indeed, under petitioner's thesis the Wyoming Supreme Court would be unable to overrule any of its prior decisions on the local law of Wyoming.

Question Presented

Where it is alleged that the Supreme Court of Wyoming erroneously applied the law of the State of Wyoming, is there raised a federal constitutional question of which this Court will take cognizance?

Statement of the Case

The Supreme Court of Wyoming decided this case on the basis of the local law of Wyoming. The petitioner, through a tortured analysis of the opinion of the Wyoming Supreme Court, tries to convert what are ordinary questions of local law into overriding federal constitutional questions. We submit that the petitioner's contentions are totally frivolous and that the petition for a Writ of Certiorari should be denied.

The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3). But there is not here drawn in question the validity of a treaty or statute of the United States or the validity of a state statute at all; and there is here no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States (28 U.S.C. § 1257(3)).

The petitioner did not claim that there was any federal question in this case until she sought rehearing of the determination of the Supreme Court of Wyoming (Appendix A *infra*, pp. A1-A14). In that petition for rehearing the petitioner merely made conclusory allegations that the determination of the Supreme Court of Wyoming violated

Amendment 5 to the United States Constitution with regard to due process of law; Amendment 7 to the United States Constitution with regard to trial by jury; and Amendment 14 to the United States Constitution dealing with due process of law and equal protection of the laws (Appendix A infra, p. A13).

The entire argument advanced by petitioner in support of her contentions that both the Wyoming and United States Constitution had been violated was (Appendix A *infra*, p. A14):*

> "An individual's cause of action is a property right that must be treated fairly and decently. It must not be made the subject of 'special' appellate rules that are not reserved for other causes of action. If this Court is not going to make factual determinations for other causes of action, then it must not do so for Miss Housen. If this Court is not going to grant the *appellant* the evidentiary presumption for other causes of action, then it must not grant that presumption to Mr. Duke. If this Court is going to require defendants in other cases to prove their affirmative defenses, then it must do so in this case."

The Facts

In early April 1970, the petitioner was living, working and going to college part-time in the Washington, D.C. area; on April 4, 1970, petitioner was introduced by her brother to the respondent (2a).**

On the night of April 4, 1970 and the early morning of April 5, 1970 the petitioner engaged in sexual intercourse

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* The petitioner in her petition for rehearing and in her petition for a writ of certiorari has not cited a single case for authority in support of her contention that she has been denied federal constitutional rights.

** Figures in parentheses refer to pages in the appendix to petitioner's petition unless otherwise noted.

with the respondent in the front seat of his pickup truck; and on April 8, 1970 the petitioner met the respondent at the La Guardia Airport in New York and subsequently travelled by truck with him from New York to Denver, Colorado, engaging on and off in acts of sexual intercourse with the respondent along the way (2a).

Apparently, the petitioner and the respondent separated in Denver, Colorado and the respondent lodged petitioner in a local hotel and left for his home in Meeteetse, Wyoming (2a); the petitioner and her brother subsequently travelled to Meeteetse and confronted respondent concerning his behavior; as a result of that discussion it was agreed that the respondent would accompany petitioner and her brother back to Washington, D.C. and apologize to her family; yet after arriving in Washington, D.C. and discussing the situation with her family, the petitioner for an undisclosed reason accompanied the respondent to New York where they occupied a hotel room together and engaged in sexual intercourse (2a).

On April 21, 1970, the respondent broke off his relationship with the petitioner and informed her for the first time that he had gonorrhea and that now she probably had it too (2a-3a). The petitioner on April 22, 1970 visited her personal physician in Washington, D.C. who, through a smear test, confirmed that gonorrhea was present in the petitioner (3a).*

It appears that petitioner's infection, described by her physician as a classic case of asymptomatic gonorrhea, was arrested by May 14, 1970 (3a); but in January 1973 the petitioner noticed pains in her lower right side which by March 1973 had become so severe and constant as to require medical attention; and after various tests were conducted exploratory surgery was performed in July 1973 (3a-4a).

* The medical authorities seem to agree that the incubation period for gonorrhea may vary from 2 to 10 days (ftn. 4, 40a).

Petitioner's physician testified that because of the gonorrhea infection, and possibly other related secondary infections as well, adhesions had formed within a number of areas of petitioner's lower abdomen (4a); petitioner's physician testified that although he had loosened or detached by surgical procedures the adhesions, thus somewhat relieving temporarily the pain, nonetheless because of the nature of the scar tissue involved, new adhesions would eventually form and pain would very probably return again and continue in such cyclical manner for the remainder of petitioner's life; and that petitioner's ability to bear children had thus been greatly reduced (4a).

The evidence in this case, adduced from the petitioner, was that sexual intercourse between the petitioner and respondent took place on the dates and places as follows (16a):

Date of Sexual Intercourse	*Place of Occurrence*
April 4 and 5, 1970	State of Virginia
April 7 and 8, 1970	Tuxedo, New York
April 8 and 9, 1970	Erie, Pennsylvania
April 9 and 10, 1970	State of Iowa
April 10 and 11, 1970	Ogallala, Nebraska
April 20 and 21, 1970	New York City, New York

Thus there was no evidence of sexual intercourse ever taking place in the State of Wyoming (16a). Petitioner's action was filed in the State Courts of Wyoming on April 19, 1974 (22a), more than four years after every act of sexual intercourse between the parties other than the sexual intercourse which occurred on April 20, and 21, 1970 in New York City, New York (16a, 22a).

Accordingly, the Supreme Court of Wyoming held that it must look elsewhere than the State of Wyoming for a jurisdiction in which the cause arose under the borrowing statute of limitation of the State of Wyoming (16a-17a).

The Supreme Court of Wyoming said that the limitation of action statute of the foreign jurisdiction in which the cause in question arose is applied by the forum court irrespective of whether or not the foreign limitation could be characterized as substantive or procedural; and thus if the petitioner's cause of action was time-barred in the jurisdiction in which the cause of action arose, it would be barred by the passage of time in the forum Court as well (16a-17a).

It is the construction and application of the Wyoming borrowing statute as to which the petitioner principally complains. We submit that any question relating to the construction and application of that borrowing statute is a mere matter of local law and that the petition which seeks to twist the matter into a federal constitutional question is, at best, frivolous. Indeed, as this Court has ruled again and again, where the State Court has decided the case upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.*

Summary of Reasons Why Certiorari Should Be Denied

We do not dispute that State Courts, including the Wyoming Supreme Court, are obligated to protect rights granted by the United States Constitution (see Pet. pp. 16-19). But no such federal rights are involved in this case and all that is involved is construction and application of the law of the State of Wyoming.

Even if, as petitioner argues, the Wyoming Supreme Court made findings of fact without basis in, or directly contradictory to, the trial record, no federal question is raised. Even if such action by the Wyoming Supreme

* *Wolfe* v. *State of North Carolina*, 364 U.S. 177, 195-6 (1960); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129 (1945).

Court is erroneous under Wyoming law (cf. Pet. pp. 19-20), nonetheless these are matters of State law and are of no concern to this Court, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129 (1945). The rulings of the Supreme Court of Wyoming as to the facts and as to Wyoming law are final and conclusive in this Court. *Watts* v. *Indiana*, 338 U.S. 49, 50-1 (1949); *Nickel* v. *Cole*, 256 U.S. 222, 225 (1921). *Senn* v. *Tile Layers Prot. Union Local No. 5*, 301 U.S. 468, 477 (1937); *Cope* v. *Anderson*, 331 U.S. 461, 466-8 (1947).

Even if, as petitioner urges, the Wyoming Supreme Court relieved respondent of the burden of proving the defense of the statute of limitation (see Pet. pp. 22-6), nonetheless that is a matter of Wyoming law and such determination cannot be impeached in this Court. *Wolfe* v. *State of North Carolina*, 364 U.S. 177, 195-6 (1960); *John* v. *Paullin*, 231 U.S. 583, 585 (1913).

Even if, as petitioner urges, the Wyoming Supreme Court in this case failed to follow its usual appellate procedure that all evidence must be viewed in the light most favorable to the prevailing party in the trial court (See Pet. pp. 26-8) nonetheless, that is solely a matter of State law for conclusive determination by the State Courts and not open for reconsideration in this Court. *Wolfe* v. *State of North Carolina*, 364 U.S. 177, 196 (1960); *Fox River Co.* v. *R.R. Comm.*, 274 U.S. 651, 655 (1927); *Sauer* v. *New York*, 206 U.S. 536, 546 (1907).

In sum here, we have a case which turns solely on determination of State law. Whether or not the Wyoming Supreme Court correctly decided those questions of State law (and we assert that it did), nonetheless even error by the Wyoming Supreme Court as to Wyoming law or the law of any other State, is not open for review in this Court, as this Court has uniformly held.

I

The findings of the Wyoming Supreme Court are supported by the record; even if the Wyoming Supreme Court erred in its findings no federal question is raised thereby.

The jury found that the respondent was infected with gonorrhea during the period of April 4, 1970 through April 21, 1970 (5a). The evidence was undisputed that petitioner and respondent had sexual intercourse in various places—but none in Wyoming—during the period of April 4 through April 21, 1970 (16a). Obviously if the respondent infected the petitioner with gonorrhea, such infection occurred on one or more of the dates of sexual intercourse between April 4 through April 21, 1970.

The petitioner then says that the Wyoming Supreme Court found that a cause of action arose in New York on April 8 and April 21, 1970 (pet. p. 21); and that for some never explained reason that finding is in complete conflict with the jury finding that respondent had gonorrhea between April 4 and April 21, 1970 (pet. p. 21). There is nothing inconsistent between the jury's finding and the holding of the Wyoming Supreme Court.

For purposes of the New York statute of limitation, such finding and holding was mandated by New York law (18a-19a).[1] The thrust of New York law simply put is that a cause of action accrues for limitation purposes, at least, at the time the petitioner's body was invaded. Here respondent invaded petitioner's body in New York on April 7-8 and April 20-21, 1970 (16a); and thus causes of action accrued in New York at those times; but were barred by the New York three (3) year statute of limitation (22a).

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[1] *Schwartz* v. *Heyden Newport Chem. Corp.*, 12 N.Y. 2d 212 (1963) cert. den. 374 U.S. 808 (1964); *Thornton* v. *Roosevelt Hospital*, 59 App. Div. 2d 680 (1st Dept. 1977).

Petitioner further complains that the Wyoming Supreme Court failed to find that Nebraska was the place where a cause of action accrued (pet. p. 21). The record shows that the petitioner and respondent had sexual intercourse in Nebraska on April 10-11, 1970 (16a). The Wyoming Supreme Court construed the law of the State of Nebraska as requiring various elements to be established in order that there be a cause of action under Nebraska law (32a). Since all of those elements were not present, the Wyoming Supreme Court ruled that as a matter of Nebraska law no cause of action arose there.[2]

But the Wyoming Supreme Court also said that even if a cause of action arose in Nebraska it accrued at the time of the exposure on April 10 and 11, 1970 and hence the Nebraska four-year statute of limitation would have barred a Nebraska cause of action in any event (32a-33a).

As a general rule, where the tort alleged is the negligent communication of an infectious disease the date of accrual of the cause of action for statute of limitation purposes is either: 1) the date of exposure to the disease; or 2) the date on which the infection was discovered; or 3) where there is a continuing exposure, the date of the last exposure.[3]

Here the place of the second and last exposures was New York, which has a three-year statute of limitation. Hence, the exposure on April 8, 1970 was barred under New York

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[2] *Bend* v. *Marsh*, 145 Neb. 780, 18 N.W. 2d 106, 110 (1945).

[3] *Schwartz* v. *Heyden Newport Chem. Corp.*, 12 N.Y. 2d 212 (1963) cert. den. 374 U.S. 808 (1964); *Thornton* v. *Roosevelt Hospital*, 59 App. Div. 2d 680 (1st Dept. (N.Y.) 1977); *Augustus* v. *Republic Steel Corp.*, 100 F. Supp. 46 (N.D. Ala. 1951); *Wright* v. *Carter Products, Inc.*, 244 F. 2d 53 (2 Cir. 1957); *Armour & Co.* v. *Mitchell*, 262 F. 2d 580 (6 Cir. 1958); *Young* v. *Clinchfield R. Co.*, 288 F. 2d 499 (4 Cir. 1961).

law on April 8, 1973 and the exposure on April 21, 1970 was barred under New York law on April 21, 1973.

The instant suit was not filed in Wyoming until April 19, 1974. Wyoming is the forum state for purposes of this suit only and is not a state in which a cause of action did accrue or could accrue. Hence, under no circumstances could Wyoming's four-year statute of limitation apply since it never applies where the cause of action accrued outside of Wyoming; and as the Wyoming Supreme Court held it must apply the statute of limitation of some other state for if the cause of action was barred in the state of accrual it was barred under Wyoming law (16a-17a).

Under the borrowing statute of the State of Wyoming, as applied by the Wyoming Supreme Court, the following table shows the dates when the petitioner's cause of action would have been barred by the law of the various states where the cause of action could have accrued:

Date of Sexual Intercourse	*State*	*Statute of Limitations*	*Action Barred After*
4/4-5/70	Virginia	2 years	April 5, 1972
4/7-8/70	New York	3 years	April 8, 1973
4/8-9/70	Pennsylvania	2 years	April 9, 1972
4/9-10/70	Iowa	2 years	April 10, 1972
4/10-11/70	Nebraska	4 years	April 11, 1974
4/20-21/70	New York	3 years	April 21, 1973

Thus, the latest possible date on which the petitioner could have brought her cause of action was April 11, 1974; since she did not commence the instant action until April 19, 1974, her cause of action was barred no matter where it accrued.

The Wyoming Supreme Court examined the facts adduced from petitioner in the light of the applicable law of

all of the relevant states; analyzed those facts with respect to the limitation period at the situs of the event and applied the borrowing statute of Wyoming to determine whether or not the action was viable in the state where the event occurred. In doing so, the Wyoming Supreme Court applied the Wyoming borrowing statute because if the cause of action was barred wherever it accrued it was likewise barred in Wyoming. Thus, the Wyoming Supreme Court gave the petitioner the benefit of the law of all states in which sexual events occurred; and thus even though no particular state could be pinpointed as the exact state in which she was infected, nonetheless as the Wyoming Supreme Court held that did not matter because the petitioner's cause of action was barred in all of the states. Certainly, the Wyoming Supreme Court gave the petitioner the benefit of every conceivable doubt and there was nothing arbitrary or capricious in the ultimate determination of the Wyoming Supreme Court.

Accordingly, there is no finding of fact made by the Wyoming Supreme Court in conflict with the record or unsupported by the record. The Wyoming Supreme Court rulings were predicated on the undisputed evidence as to dates and places of exposure and the applicable law of the various States. Hence, even if the Wyoming Court erred (which it did not) in its analysis of the evidence and in its application of the law of other States, nonetheless no federal constitutional issue arises and this Court does not review such alleged erroneous judgments. *Cope* v. *Anderson,* 331 U.S. 461, 466-8 (1947); *Fauntleroy* v. *Lum,* 210 U.S. 230, 236-7 (1908); *John* v. *Paullin,* 231 U.S. 583, 585 (1913).

II

The Wyoming Supreme Court did not relieve respondent of the burden of proof with respect to the defense of the statute of limitation; and even if it did, no Federal Constitutional question is raised thereby.

The Wyoming Supreme Court held that where the cause of action did not accrue in the State of Wyoming, the questions relating to the statute of limitation must be referred to the State where the cause of action accrued. That seems to be the general rule of law in Wyoming as stated by the Supreme Court of Wyoming (10a-12a). Hence, the petitioner cannot complain that the rule of law applied by the Wyoming Supreme Court was any different in this case from all other cases.

Petitioner seems to be arguing that the respondent cannot possibly carry the burden of proving his statute of limitation defense unless the respondent takes the stand and testifies as to that defense. Petitioner simply overlooks that the evidence establishing the statute of limitation defense was adduced from the petitioner's mouth, to wit, the dates and places where the sexual intercourse took place (16a). And furthermore, since the petitioner did not testify that sexual intercourse ever took place in the State of Wyoming (16a), it follows that the Wyoming borrowing statute became automatically applicable, as the Supreme Court of Wyoming held (16a-17a).

In an effort to sustain its argument the petitioner misstates and misconstrues the opinion of the Supreme Court of Wyoming; takes statements in the opinion completely out of context; and thoroughly confuses what the Wyoming Supreme Court said.

The Wyoming Supreme Court did not hold that discovery of a cause of action is an event that is forum-determinative (cf. pet. p. 24). In this connection the petitioner distorts the holding of the Supreme Court of Wyoming by taking from context the Supreme Court's reference to the Wyoming discovery rule (pet. pp. 24-5).

The Supreme Court of Wyoming discussed the impact of the sexual intercourse in Nebraska under various rules of law and concluded that applying any of those rules precluded the petitioner herein (32a).

First the Supreme Court pointed out that if the Court followed the New York rule of injury being concurrent with the tortious act of invading the petitioner's body with a dangerous substance, the Nebraska statute of limitation barred the petitioner's claim since the exposure took place in Nebraska on April 10th and 11th, 1970 (32a-33a).

If on the other hand the Wyoming discovery rule was followed then, said the Supreme Court, the cause of action as to the intercourse which occurred in Nebraska arose in Washington, D.C. where the petitioner discovered that she was infected with gonorrhea. However, the Supreme Court of Wyoming did not hold that the Wyoming discovery rule should be followed as to the cause of action relating to the sexual intercourse which occurred in Nebraska and rejected that rule (34a).

And finally, the Supreme Court of Wyoming said that if it followed the last exposure rule then since the last exposure occurred in New York, the cause of action, as to the sexual intercourse which occurred in Nebraska, arose in New York. However, the Supreme Court of Wyoming did not apply the last exposure rule (34a).

In sum, the Supreme Court of Wyoming applied the rule of injury being concurrent with the tortious act of invading the petitioner's body with a dangerous substance and hence found that any alleged Nebraska cause of action was barred by the Nebraska statute of limitation (32a-33a).

Petitioner asserts that respondent argued to the Wyoming Supreme Court that the New York statute of limitation was made applicable through the Wyoming borrowing statute; and raises the question of why respondent did not select the Wyoming four-year statute or the Colorado six-year statute or the Nebraska four-year statute or the Ohio four-year statute or the Illinois five-year statute or the Montana four-year statute (pet. pp. 11-12). Since no sexual intercourse had occurred in Colorado or Ohio or Wyoming or Illinois or Montana it was obvious that the statutes of limitation of those States were not applicable. The Supreme Court of Wyoming pointed out that sexual intercourse had taken place in Virginia and Pennsylvania but any cause of action which may have accrued in either of those two states was barred by the respective statute of limitation of those two states (26a-28a; 29a-30a).

Hence, the Wyoming Supreme Court did not relieve respondent of his burden of establishing that the petitioner's claim was barred by the statute of limitation. The proofs that the claim was so barred were adduced from petitioner's own testimony as to the dates and places where sexual intercourse took place and from the statutes of limitation of the appropriate states as to which the Court took judicial notice.

Even if the Supreme Court of Wyoming was completely in error in applying its borrowing statute and the statutes of limitation of various other states, nonetheless no federal constitutional question is raised and this Court will not permit the judgment of the Supreme Court of Wyoming to be impeached. *Wolfe* v. *State of North Carolina,* 364 U.S. 177, 195-6 (1960); *Cope* v. *Anderson,* 331 U.S. 461, 466-8 (1947); *Fauntleroy* v. *Lum,* 210 U.S. 230, 236-7 (1908).

III

The Supreme Court of Wyoming reviewed the evidence most favorable to the petitioner; even if it failed to do so, no federal question is raised thereby.

The Wyoming Supreme Court made it very clear in its opinion that whenever it referred to dates, places or circumstances, the references were derived entirely from the petitioner's evidence, undisputed facts, and answers of the jury to interrogatories propounded to it; and that the Supreme Court disregarded any evidence of the defendant in conflict therewith (7a).

The petitioner proceeds on the thesis that the Supreme Court of Wyoming paid only lip service to the statement made by the Supreme Court. We think that the attempt by petitioner to charge the Supreme Court of Wyoming with "talking out of both sides of its mouth at the same time" comes with very ill grace and is obviously the last refuge of a disgruntled litigant, who seeks to unfairly impugn the Court which decided against her.

Again the petitioner relies upon the jury's finding that the defendant was infected with gonorrhea during the period of April 4, 1970 through April 21, 1970 (pet. p. 27). The petitioner says that the jury's answer to that interrogatory determined that the infection of the petitioner occurred some time during that period and that further clarification of the occurrence was not possible nor was it revealed by the evidence (pet. p. 27). And then the petitioner argues that the Wyoming Supreme Court could not find and hold that cause of action arose in the State of New York on April 8, 1970 and April 21, 1970 (pet. p. 27).

The petitioner's argument is a pure non-sequitur. The Supreme Court of Wyoming made that finding and holding based upon the applicable New York law. New York law

is clear that when sexual intercourse occurred in New York, at a time when the respondent was infected with gonorrhea, the cause of action immediately arose. In short, as the Supreme Court of Wyoming said (32a-33a) under New York law the injury is concurrent with the act of invading the petitioner's body with a dangerous substance; and that necessarily occurred when the acts of sexual intercourse took place in New York. At least that is the law of the State of New York. See e.g. *Thornton* v. *Roosevelt Hospital,* 59 App. Div. 2d 680 (1st Dept. 1977).

Not only did the Wyoming Supreme Court analyze the evidence most favorable to the petitioner but the law as well. The Wyoming Supreme Court examined the law as to each state in which intercourse occurred because it would not guess as to which act of intercourse actually caused the infection (32a). According to petitioner's testimony she was infected by April 22, 1970 (3a). Necessarily, she had been infected before that date because the incubation period for gonorrhea is not instantaneous and may vary from two to ten days (ftn. 4, 40a). As the Wyoming Supreme Court said the only medically certain inference is that she had gonorrhea in New York on April 21, 1970 (32a), the day before she was examined in Washington, D.C. and was said by the doctor to have gonorrhea (3a).

On the basis of the evidence adduced from petitioner as to when and where sexual intercourse occurred, the Wyoming Supreme Court applied the limitation rule in each state to the event which occurred in each state. The Wyoming Supreme Court then ruled as matter of law that with respect to each state if a viable cause of action accrued there, it was barred by limitations of time. Thus, the Wyoming Supreme Court analyzed the evidence and the applicable law most favorable to petitioner and ruled that under the best of circumstances she could not recover.

It seems clear that the petitioner was forum shopping at the time the suit was filed on April 19, 1974 because in none of the states in which the sexual intercourse occurred was there an action extant. This is made clear by her strident arguments that Wyoming's statutes of limitation (other than the borrowing statute) applied when palpably no act of any kind had ever occurred in Wyoming (10a-11a). The Wyoming Supreme Court held flatly that the statute of limitation of Wyoming (other than its borrowing statute) was not applicable and that holding is binding in this Court (7a-8a; 9a; 11a-12a).

Thus, a fair analysis of the opinion of the Wyoming Supreme Court demonstrates that all doubts were resolved in favor of the petitioner, both factually and legally, but nonetheless she could not maintain this action. It certainly cannot be said that the Wyoming Supreme Court violated any of the petitioner's rights of due process or equal protection nor did it shift any burden of proof, but rather took the evidence as testified to by the petitioner and diligently attempted to locate any state in which the action could be maintained. Since the action could not be maintained in any state on the basis of the petitioner's testimony, the Wyoming Supreme Court had no alternative but to dismiss the action.

But even if we assume that the Supreme Court of Wyoming misconstrued the law of any State, including Wyoming, and even if we assume that the Supreme Court of Wyoming erroneously applied the law of any State, including Wyoming, nonetheless this Court will not take jurisdiction to correct such alleged errors since they do not in any way raise a federal constitutional or other federal question. *McCoy* v. *Shaw,* 277 U.S. 302 (1928); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945); *United States Fidelity & Gty. Co.* v. *State of Oklahoma,* 250 U.S. 111 (1919); *Southwestern Bell Telephone Co.* v. *State of*

Oklahoma, 303 U.S. 206 (1938); *Seaboard Airline Ry. Co.* v. *Watson,* 287 U.S. 86 (1932); *Honeyman* v. *Hanan,* 300 U.S. 14, 302 U.S. 375 (1937).

Conclusion

What the petitioner completely overlooks is that the final arbiter of the meaning and effect of the law of a particular state is the highest Court of the State. This Court invariably accepts as conclusive the meaning, construction and application of State law by the highest Court of that State. This Court has appositely said that it lacks jurisdiction authoritatively to construe State legislation.*

This Court has uniformly held that it will not second-guess the highest Court of the State as to the meaning and application of the law of that State. This Court has consistently held that it will not review the fact finding procedures of the Supreme Court of a State nor will it sit as a supervisory Court to construe and apply State law. This Court has uniformly held that it will accept the rulings of the highest Court of the State with respect to the application and meaning of the law of that State.

Petitioner now asks this Court to accept a jurisdiction which this Court has uniformly refused to accept for well over a century. The petitioner asks this Court to upset and overrule literally hundreds of decisions of this Court and to involve itself in the construction and application of local law.

There is not here any fact or rule of law setting forth any special or important reasons for granting a writ of certiorari. Certainly there is not involved herein any determination by a State Court of any federal question of

* *United States* v. *37 Photographs,* 402 U.S. 363, 369 (1971).

substance nor has the State Court of Wyoming decided any federal question whether or not of substance in any way not in accord with applicable decisions of this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

IN THE

SUPREME COURT OF WYOMING

STATE OF WYOMING

"PONY" DUKE, Appellant, (Defendant below) vs. MARGARET HOUSEN, Appellee, (Plaintiff below)	No. 4811

PETITIONS FOR REHEARING

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PETITION FOR REHEARING

This petition is submitted by Appellee Housen to this Court for the purpose of obtaining a rehearing. The rehearing is for the following reasons:

1. The majority opinion does not apply the fundamental principle of appellate procedure which grants to the appellate every favorable inference that can be drawn from the evidence adduced at trial, disregarding evidence of the appellant in conflict therewith.
2. The majority opinion errs by making explicit factual determinations on the appellate level.
3. The majority opinion relieves Mr. Duke of his burden of proving his case and the burden of proving his affirmative defenses.
4. The majority opinion misconstrues the concept of discovery.
5. The majority opinion deprives appellee of fundamental constitutional rights as guaranteed by the United States and the Wyoming constitutions.

Each of these points will be discussed concisely hereafter.

1. *Negating Presumption Construing Evidence Most Favorably to Appellee*: This Court has consistently maintained that all evidence must be viewed in the light most favorable to the prevailing party. *Overcast* v. *Baldwin,* 544, P.2d 464, 465 (Wyo. 1976). This principle of appellate procedure has necessitated the rule that this Court must "leave out of consideration entirely evidence of the unsuccessful party in conflict therewith; and give to the evidence of the successful party every favorable inference which may be reasonably and fairly drawn from it." *Zitterkop* v. *Roussalis,* 546 P.2d 436, 437 (Wyo. 1976).

This majority opinion even affirms this guiding principle of appellate practice with the following statement:

> Whenever we refer in this opinion to dates, places, or circumstances, such reference will be derived entirely from the evidence of the plaintiff, undisputed facts and answers of the jury to interrogatories propounded by them. We will disregard any evidence of the defendant in conflict.
>
> —Majority Opinion, Page 5.

After making the above statement, however, the majority proceeds to construe the evidence in the light most favorable to *appellant.* Examples of this reversal of the presumption are the following:

a. The majority simply ignores the jury's determination as reflected in its Answer to Interrogatory No. 1. In that interrogatory the jury answered affirmatively the question "Do you find that the Defendant was infected with gonorrhea during the period of April 4, 1970, through April 21, 1970?" Thus, the jury could only determine that the infection occurred *sometime* during that time period; further clarification of the occurrence was not possible, *nor was further clarification revealed by the evidence.* Yet, in spite of the jury's declaration, and in spite of the absence of evidence shedding further light on this point, the majority opinion declares that "We *find* and *hold* that a cause of action arose in the State of New York on April 8, 1970, and April 21, 1970." (Majority Opinion, Page 14, emphasis added.) Let it be remembered that Miss Housen's cause of action is based upon the negligent *infliction* of a communicable disease; it is not based upon the act of intercourse, but rather *is based upon the infliction of the disease.* In *finding* that April 8 and April 21 were the operative dates, this Court ignored the jury's finding as re-

flected in the interrogatory answer. Moreover, it made that *finding* even though the evidence adduced by the plaintiff—the party to whom the presumption is granted—was to the contrary. Plaintiff's evidence—even plaintiff's medical evidence—was that the disease is not inflicted uniformly and is not inflicted immediately.

b. The majority opinion consistently construes the evidence concerning exposure of Miss Housen to bacteria in the light most *unfavorable* to her. Thus, it is stated that on April 8, 1970, Pony Duke "introduced into the body of the plaintiff infectious pus producing bacteria known as gonococci, which causes the disease of gonorrhea." (Majority Opinion, Page 16.) There is simply no way in which this conclusion can be reached without making a number of intermediate judgments regarding the evidence in a light most favorable to Pony Duke. The court's conclusion assumes, for instance, that ejaculation occurred, that no contraception occurred, that the penetration of the ejaculated fluid, if any, contained the infectious pus, that the infectious pus, if any, traveled sufficiently far up the vagina to have an effect, that if the *exposure* did not occur from infectious pus within the ejaculated fluid that it occurred from contact between Mr. Duke and Miss Housen, and that the *exposure* to the infectious pus, if any, caused an *infliction of the disease* as contrasted to an exposure that was successfully resisted on that occasion by Hiss Housen's body.

The evidentiary judgments which the majority makes unfavorably to Miss Housen are placed in sharp focus by the Court's own language later in the opinion. On Page 25 the Court says "in this case there is no proof as to just when plaintiff was actually infected—the only medically certain inference is that she had gonorrhea in New York on April 21, 1970. The gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to." In spite of this declaration by the Court, the evidentiary assumptions mentioned earlier were made to support the Court's *finding* and *holding* on Page 14 and the evidentiary conclusions reached on Page 16.

2. *Fact Finding:* The majority opinion does more than merely ignore the appellate rule requiring an interpretation of the evidence in the light most favorable to the successful party. The majority actually converts itself to the fact finding body, and makes explicit factual determinations. Moreover, these determinations were *not* made at the trial level, and are in some instances at strict variance with the evidence introduced at the trial and the answers to the interrogatories provided by the jury. The majority, thereby, errs in not following the oft repeated rule that it is not this Court's "function to determine the facts and the law in a case in the first instance. That must be done by the trial court." *Buckman* v. *United Mine Workers of America,* 339 P.2d 398, 402 (Wyo. 1959).

The determinations made by the Court include the following:

a. The Court states that there "is no evidence of sexual intercourse taking place in the State of Wyoming." (Majority Opinion, Page 12.) Yet, the Court then makes the determination that in fact there was no intercourse in Wyoming. The absence of evidence does not justify the determination that no sexual intercourse occurred.

b. The majority *assumes* that no sexual intercourse occurred in Colorado even though it is clear that both Mr. Duke and Miss Housen were in Colorado. (Majority Opinion, Page 12.) This assumption and

finding is particularly damaging in light of an actual fact, namely that Colorado has a six year statute of limitations. § 13-80-119, CRS.

c. The majority states as follows: "We find and hold that a cause of action arose in the State of New York on April 8, 1970, and April 21, 1970." (Majority Opinion, Page 14.) It would be difficult to conceive a more explicit factual finding than this one. The initiative of the majority is in complete conflict with the answer provided to the jury to Interrogatory No. 1. By stating affirmatively that Miss Housen was infected with gonorrhea during the period of April 4, 1970, through April 21, 1970, the jury was unable to provide the clarification accomplished by this appellate Court.

d. The Court states that on April 8, 1970, Pony Duke "introduced into the body of the plaintiff infectious pus producing bacteria known as gonococci, which causes the disease of gonorrhea." (Majority Opinion, Page 16.) Within the same paragraph, the majority expands its factual determinations by finding that "on the morning of April 21, 1970, the defendant once again at a hotel in New York City, New York, repeated the tortious act and once again in the same fashion introduced into the body of plaintiff the bacteria of gonococci." These alleged statements of fact require this Court to have a body of knowledge that was not presented at the trial. They represent determinations made by this Court on the basis of evidence developed and known only by this Court. The determinations assume, for instance, ejaculation or some other method of actual exposure, no contraception, the presence of infectious pus, the presentment of that pus to the vagina, and the exposure was not resisted by Miss Housen's body on those occasions.

e. The Court determines that the multiple contacts in New York gave rise to two causes of action, either of which could have been pursued in New York within three years. This determination is similar to the application of the multiple publication rule in a libel case. However, the Court then does not grant recognition to the other "publications" that occurred in other parts of the United States. This picking and choosing of publications arbitrarily denies Miss Housen of her property right to a claim against Pony Duke.

f. On Page 27 the majority discounts the application of the Nebraska four year statute by saying that the Nebraska cause of action "arose" in Washington, D.C. where she learned of the gonorrhea. Thus, in reviewing the possible application of the Washington, D.C. statute, the majority discounts this by finding "her physical injury of contracting gonorrhea took place elsewhere." This finding is made in spite of the fact that two pages earlier the Court stated "The gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to." In the face of the statement on Page 23, how can the majority just two pages later *find* that the "physical injury of contracting gonorrhea took place" at a place other than Washington, D.C.

The result achieved by the majority is dependent upon an array of "facts" determined and developed by the majority. The error committed by the majority, moreover, is recognized and affirmed by the majority throughout its opinion:

a. On Page 22 the majority states that "there is no testimony or evidence in this case as to exact time the plaintiff was infected by exposure to defendant's

disease." This statement simply cannot stand within the same opinion that states on Page 14 that "New York City, New York was the place where the defendant committed his second and last acts of negligence in *communicating* disease to the plaintiff." (Emphasis added.)

b. On Page 5 of the opinion, the majority states "There is therefore left only a question of law to decide. We cannot and will not decide any question of fact." This statement is in direct conflict with the numerous questions of fact actually decided by the majority in the balance of its opinion.

3. *Burden of Proof:* As Justice McClintock properly points out in his dissent, the majority relieves Pony Duke of the burden of proving the applicability of the borrowing statute. There is absolutely no question at all that the law of the forum—namely, Wyoming—is controlling for the purposes of the statute of limitations. *Union Stockyards Nat. Bank of South Omaha* v. *Maika,* 16 Wyo. 141, 92 P. 619 (Wyo. 1907); *Riley* v. *Union Pacific Railroad Co.,* 88 F.Supp. 391 (D.C. Wyo. 1950) affirmed 182 F.2d 765 (10th Cir. 1950). The only time that the lex fori rule can be modified is if a borrowing statute is shown to be applicable. And, that, happens to be the key factor—*if it can be shown to be applicable.* The defendant has not done so.

This is a matter of proof for the party asserting the claim—namely the defendant:

> The party pleading the statute of limitations has the burden of proving that the action is barred.
>
> *Garland* v. *True Temper Corporation,* 354 F. Supp. 328, 330 (D.C.W.Va. 1973).

See also, 5 Am Jur *Trials* 441, § 63 at 582, *Ray* v. *Oklahoma Furniture Mfg. Co.,* 40 P.2d 663 (Okla. 1934);

Savanna Bank & Trust Co. v. *Meldrim,* 25 S.E.2d 567 (Ga. 1943); *Swearingin* v. *Rendigs,* 4 N.E.2d 695 (Ohio 1935); *Wahl* v. *Cunningham et al.,* 6 S.W. 2d 576 (Mo. 1928).

The burden upon defendant Duke to prove the bar of the limitations is underscored in Wyoming by the Wyoming Rules of Civil Procedure. Rule 8(c) leaves no room for doubt that the statute of limitations is an *affirmative defense* that not only must be asserted by the defendant, but also failure to do so will constitute a waiver of the defense.

On Page 8 of the majority opinion, it states that Miss Housen "elects to ignore the borrowing statute." Let it be emphatically stated to this Court that Miss Housen did not "elect", choose, or in any other manner ignore the borrowing statute. Let it be said emphatically, moreover, that Pony Duke did absolutely nothing to make that statute applicable to this case because he completely and utterly failed to prove the application of the statute. To trigger the borrowing statute requires the defendant to prove a forum "where the cause of action arose." § 1-25, W.S. 1957. He simply failed to make such proof. The majority's statement that Miss Housen "ignores" the application of the borrowing statute has the same attraction as a statement in an automobile accident case where an appellate court reverses a jury finding of negligence after the defendant neither pleaded nor proved contributory negligence for the reasons that the *plaintiff* ignored the affirmative defense. A plaintiff in any tort litigation has a sufficient burden without this Court placing the additional burden of the defendant's affirmative defenses on his or her shoulders.

4. *Discovery:* The majority at one point in its opinion seems to hold that discovery of a cause of action is an event that can be forum determinative. The concurring opinion places such emphasis on that theory that it argues that Washington, D.C. should be held to be the jurisdiction where the cause of action arose even though there is no

evidence that sexual relations were conducted there, and even though there is no one who can say whether or not the infection started there.

The discovery of a tort has the effect of determining the *date when* the statute begins to run rather than *where* the statute begins to run. (See Dissent of Justice McClintock.) This factor becomes important because the majority summarily eliminates Nebraska's four year statute of limitations by using the discovery concept to jump to Washington, D.C.: "If the Wyoming discovery rule, footnote 8, is followed, then the cause of action as to Nebraska arose in Washington, D.C. where the presence of gonorrhea in plaintiff was confirmed." (Majority Opinion, Page 27.) This misconstrues the function of discovery—it starts the clock but it does not determine the state in which the clock will start ticking.

The summary treatment given to the Nebraska four year statute is inappropriate. There can be no question that had the only sexual contact between Miss Housen and Mr. Duke occurred in Nebraska on April 11, 1970, and that the discovery occurred on April 20 or April 21, Miss Housen would have had a cause of action against Mr. Duke. The majority simply ignores the Nebraska statute and in so doing deprives Miss Housen of the constitutional rights discussed hereinafter. The reasoning behind this conclusion rests with the fact that the lex fori is controlling unless the *defendant* can prove the applicability of the borrowing statute. As mentioned earlier, that is the defendant's burden and it has not been met. As to the Nebraska statute, the defendant would not only have to show that the cause of action *did not arise in Nebraska* but *he* would have to *prove* where the cause of action *did* arise. That has not been done and it is improper for this Court to attempt to shoulder Mr. Duke's burden on the appellate level, particularly when the evidence presented at the trial level does not justify any finding by this Court

that the cause of action accrued in a state other than the State of Wyoming.

5. *Constitutional Violations:* The result reached by this Court violates fundamental constitutional protections guaranteed to Miss Housen by the United States and the Wyoming constitutions. The discarding of a cause of action under the circumstances discussed in this petition as well as under the circumstances discussed in Appellee's Brief violate the following specific provisions:

a. Article 1, Section 3 of the Wyoming Constitut.on dealing with equality of rights.

b. Article 1, Section 6 of the Wyoming Constitution dealing with due process of law.

c. Article 1, Section 7 of the Wyoming Constitution dealing with the arbitary exercise of power.

d. Article 1, Section 8 of the Wyoming Constitution dealing with the availability of courts for redress.

e. Article 1, Section 9 of the Wyoming Constitution dealing with trial by jury.

f. Amendment 5 to the United States Constitution dealing with due process of law.

g. Amendment 7 to the United States Constitution dealing with trial by jury.

h. Amendment 14 to the United States Constitution dealing with due process of law and the equal protection of the laws.

An individual's cause of action is a property right that must be treated fairly and decently. It must not, be made the subject of "special" appellate rules that are not reserved for other causes of action. If this Court is not going to make factual determinations for other causes of action, then it must not do so for Miss Housen. If this

Court is not going to grant the *appellant* the evidentiary presumption for other causes of action, then it must not grant that presumption to Mr. Duke. If this Court is going to require defendants in other cases to prove their affirmative defenses, then it must do so in this case.

The decision by the majority is improper and must be reversed.

Respectfully submitted,

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